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No. 98-278

IN THE
Supreme Court of the United States
October Term, 1997

IN THE MATTER OF:
VMS LIMITED PARTNERSHIP
SECURITIES LITIGATION

JOHN R. KIRWAN, CAROLYN KIRWAN,
THE JOHN R. KIRWAN TRUST,
CAROLINE SUSAN KIRWAN
and KATHLEEN MARY KIRWAN,

Petitioners.

Petition for A Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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28 pp

QUESTIONS PRESENTED

1. Whether certiorari should be granted to review the issues presented by petitioners, where (a) no circuit court decision--not even the unpublished court of appeals decision in this case--has ever addressed either of the questions on the merits; and (b) there is no indication that either of the questions involves important issues that recur in class action litigation with any frequency.

2. Whether certiorari should be granted to review the case-specific questions presented concerning the adequacy of the settlement notice at issue, where the court of appeals held that petitioners waived the issues raised in the certiorari petition, and where under the circumstances of this case the notice sufficiently identified the released parties and the released claims in any event.

PARTIES TO THE PROCEEDINGS BELOW

The parties in the court of appeals were: (1) the petitioners listed in the caption, who were plaintiffs-appellants in the court below; and (2) the following entities, which appeared as defendants-appellees in the court of appeals and which appear as respondents in this Court: CIGNA Securities, Inc., CIGNA Corporation, CIGNA Individual Financial Services Company, Insurance Company of North America, and CIGNA Realty Resources, Inc.-Sixth.

PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

CIGNA Corporation is the ultimate parent company of respondents CIGNA Securities, Inc., CIGNA Individual Financial Services Company, Insurance Company of North America, and CIGNA Realty Resources, Inc.-Sixth. CIGNA Securities, Inc. and CIGNA Individual Financial Services Company have merged and been succeeded by CIGNA Financial Advisors, Inc., whose immediate parent formerly was Connecticut General Corporation. The stock of CIGNA Financial Advisors, Inc. was recently transferred to Lincoln National Life Insurance Company, although any potential liability in this case has been retained by CIGNA Corporation or the affiliated entities identified in this paragraph. Insurance Company of North America and CIGNA Realty Resources, Inc.-Sixth are wholly owned subsidiaries of INA Financial Corporation and CIGNA Financial Partners, Inc., respectively. This litigation also involves the interests of Connecticut General Life Insurance Company, whose parent is Connecticut General Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 2

1. The Underlying *VMS* Litigation 2

2. The Class Notice Provided To Petitioners 3

3. Approval Of The Settlement And The Injunction 6

4. The Texas Lawsuit 6

5. The Enforcement Proceedings In The District Court 7

6. The District Court's Ruling 8

7. Seventh Circuit Proceedings 9

REASONS FOR DENYING THE WRIT 10

I. THE QUESTIONS PRESENTED DO NOT WARRANT THIS COURT'S REVIEW ... 12

A. There Is No Lower Court Conflict On The Questions Presented 13

Page

B. The Questions Presented Are Not Of Substantial Or Recurring Importance 14

II. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR SUPREME COURT REVIEW IN ANY EVENT 16

A. Petitioners Waived The Questions Presented Below And Thereby Deprived This Court Of The Record Necessary For Proper Consideration Of Those Questions 16

B. Petitioners Had Adequate Notice Of The Release Of Their Claims 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

California v. Taylor, 353 U.S. 553 (1957) 16

Johnson v. Massachusetts, 390 U.S. 511 (1968) 17

Keller v. Adams-Campbell Co., 264 U.S. 314 (1924) 13

Kimbrough v. United States, 364 U.S. 661 (1961) 17

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 13

Massachusetts v. Painten, 389 U.S. 560 (1968) 17

McCray v. New York, 461 U.S. 961 (1983) 14

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 14

Newsom v. Smyth, 365 U.S. 604 (1961) 16

Oliphant v. Brotherhood of Locomotive Firemen & Enginemen, 359 U.S. 935 (1959) 17

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) .. 17

Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70 (1955) 15

Rudolph v. United States, 370 U.S. 269 (1962) 14

Sanchez v. Borras, 283 U.S. 798 (1931) 13

Smith v. Mississippi, 373 U.S. 238 (1963) 17

Page

Springfield v. Kibbe, 480 U.S. 257 (1987) 16

United States v. Johnston, 268 U.S. 220 (1925) 14, 15

Wisconsin Elec. Co. v. Don Dunmore Co.,
282 U.S. 813 (1931) 13

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Petition for a Writ of Certiorari to the
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BRIEF IN OPPOSITION

Petitioners ask this Court to grant certiorari to review an unpublished court of appeals decision--and to issue sweeping constitutional declarations on issues that no circuit court has ever considered--to remedy a situation that has not been shown to be of recurring concern to litigants. Contrary to petitioners' contentions, this Court does not address broad constitutional questions in the abstract--and in the absence of a decisional conflict or any showing that the questions presented are of recurring importance to litigants. That is particularly true here,

where the court of appeals expressly *declined* to reach the questions that petitioners seek to bring to this Court on the ground that they had not been preserved or presented for appellate review. Thus, because petitioners have not shown that the questions presented warrant review, and because this case is an especially inappropriate vehicle for consideration of those questions in any event, the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

The petition arises from the district court's decision to enforce an injunction that was entered in May 1993 as part of a final judgment approving a partial class settlement. The injunction, which covered all class members who did not submit timely opt-out requests, expressly barred settling class members from bringing claims that had been released as part of the settlement. AA218-222. On February 12, 1997, the district court enforced that injunction against petitioners and barred them from prosecuting a Texas state court proceeding that asserted released claims. AA1-5.[1/]

1. The Underlying *VMS* Litigation.

The partial class settlement at issue was reached in multidistrict litigation entitled *In re VMS Ltd. Partnership Sec. Litig.*, MDL No. 847, No. 90 C 2412 (N.D. Ill.). The *VMS* litigation has included over 50 cases, many of which were class actions brought by various investors against numerous defendants, including CIGNA Securities, Inc. (later known as CIGNA Financial Advisors, Inc.) ("CIGNA") and certain

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1/ Citations are to the appendix that accompanied respondents' brief in the court of appeals.

entities and individuals affiliated with CIGNA. *See generally* AA7 (Settlement Notice describing multidistrict litigation). The settlement at issue related only to the claims against CIGNA and its Affiliates and Associates.[2/]

On February 2, 1993, after ruling on a number of substantive motions, the district court granted preliminary approval to a proposed settlement of all class claims against the settling CIGNA defendants and their Affiliates and Associates. AA8. One of the classes of plaintiffs included in the settlement was the "Financial Planning Class," which consisted of all persons who had entered into a financial planning agreement with CIGNA for a fee. AA6.

2. The Class Notice Provided To Petitioners.

On February 23, 1993, a court-approved Notice describing the proposed settlement was sent to members of the certified classes. AA6-13. With respect to members of the Financial Planning Class, the Notice explained who were members (AA6) and what claims had been alleged on behalf of the class. The Notice stated that the claims to be released arose from CIGNA's financial planning advice to the class. AA7. The underlying complaint alleged that the CIGNA defendants "were affiliates as part of a nationwide, major insurance and securities company in the business of selling insurance and securities" and complained that the advice provided pursuant to the financial planning contracts was designed to induce the class to purchase products from CIGNA and its Affiliates. AA194 ¶¶ 11-21.

2/ As discussed below, Connecticut General Life Insurance Company, one of the defendants in the Texas action, is a CIGNA Affiliate. Kathleen Hughes, the other defendant in the Texas action, is a CIGNA Associate.

The Notice was sent by first-class mail to persons who were listed on the books and records of CIGNA as having entered into financial planning contracts with CIGNA during the relevant time period. In addition, pursuant to the district court's order, a court-approved Notice of the settlement was published in the national edition of *The Wall Street Journal* on March 4, 1993. AA98.

Petitioners John R. and Carolyn Kirwan entered into a financial planning contract with CIGNA in April 1991 for a fee of $1,250. AA81-82. Accordingly, petitioners were members of the Financial Planning Class, and a copy of the Notice was sent to "John R. & C. Kirwan" at petitioners' last known address in Midland, Texas. AA84.

The Notice explained how the Kirwans could exclude themselves from the settlement if they did not wish to participate. In a section entitled "How To Exclude Yourself From The Classes," the Notice stated that all class members "have the right . . . to exclude [themselves] or 'opt out' of the Classes," but only by submitting an exclusion request by the required date. AA8. The Notice further defined "Settling Class Members" as "all members of the Classes who do not request exclusion" and stated that persons who did not opt out would release claims against all "CIGNA Entities." AA8, AA9. The Notice defined "CIGNA Entities" to include "Affiliates" and "Associates." AA6. In a section entitled "Release of Claims," the Notice provided that, upon final approval of the settlement, Settling Class Members would be deemed to have released their claims against the CIGNA Entities, on behalf of themselves and their "successors" or "assigns." AA9.

In defining "Released Claims," the Notice specified that the claims being released included "any and all" claims relating to "policies" purchased from or through any CIGNA Entity, and "any and all" claims relating to financial advice received from or through any CIGNA Entity (AA9; emphasis added):

> "Released Claims" means any and all claims, actions, allegations, causes of action, demands, defenses, counter-claims, set-offs (both legal and equitable), rights of liabilities whatsoever--including, but not limited to, known and unknown claims in connection with, arising out of, or in any way relating to any acts, facts, transactions, occurrences, representations, or omissions that have been or might have been asserted in [the consolidated actions]--that in any way arise from or relate to . . . any financial planning or investment advice provided by or involving any CIGNA Entity, *to any other securities, investments, policies, or products that were purchased from or through any CIGNA Entity, or to any other securities, investments, policies, or products with which any CIGNA Entity has or had any involvement or role whatsoever*.

The Notice also warned that the district court would enter an injunction prohibiting the litigation of Released Claims in any other proceeding or forum (AA9):

> As part of the order finally approving the proposed settlement, the Court will enter an injunction prohibiting Settling Class Members from asserting or continuing to prosecute in any other action, arbitration, or proceeding any claims released as part of the settlement.

Finally, the Notice described a claim form procedure for members of the Financial Planning Class who wished to share

in the settlement proceeds. AA8. The Notice made clear that Financial Planning Class members who did not submit a Claim Form would not receive any share of the settlement funds, although as class members who did not opt out, they would still be bound by the settlement and the release of claims. AA8, AA9.

Petitioners do not deny that they are members of the Financial Planning Class and that John and Carolyn Kirwan received the Settlement Notice that was mailed to them. *See* AA100, AA106-07. They likewise conceded in the court of appeals that they did not opt out (*see* Appellants' 4/25/97 Br. 4, 5), and it is undisputed that they failed to submit a Claim Form.

3. Approval Of The Settlement And The Injunction.

After holding a hearing, on May 21, 1993, the district court entered final judgment approving the settlement. AA218-222. As part of its judgment, the district court entered an injunction prohibiting Settling Class Members "from asserting or continuing to assert any of the Released Claims in any court or forum." AA220. The court retained jurisdiction for the purpose of effectuating and enforcing the injunction and the other provisions of the final judgment. AA222.

4. The Texas Lawsuit.

On or about August 30, 1996, petitioners commenced a lawsuit in state court in Houston, Texas against a CIGNA Affiliate, Connecticut General Life Insurance Company ("Connecticut General"), and a CIGNA Associate, Kathleen J. Hughes. *John R. Kirwan, et al. v. Connecticut General Life Insurance Company, et al.*, No. 96-44674 (Dist. Ct., Harris County, Texas). Ms. Hughes was a representative of CIGNA

and its Affiliate, Connecticut General. *See* AA58-59. The claims in the Texas action arose from advice provided pursuant to the CIGNA financial planning contract, as a result of which petitioners purchased a life insurance policy through Connecticut General and Ms. Hughes in October 1991. *See* AA70-71.

5. The Enforcement Proceedings In The District Court.

Because petitioners' claims in the Texas action sought damages as a result of plaintiffs having invested in a life insurance policy in accordance with advice that Ms. Hughes provided pursuant to the CIGNA financial planning agreement, those claims were encompassed by the claims made in the *VMS* financial planning lawsuit, and by the definition of Released Claims in the Settlement Notice and Settlement Agreement entered into in that litigation. As a result, on November 19, 1996, CIGNA and the other CIGNA Settling Defendants asked the district court to enjoin petitioners from pursuing Released Claims in the Texas action or elsewhere. *See* AA56-98. In their motion to enjoin, the CIGNA Settling Defendants demonstrated that the Kirwans were Settling Class Members bound by the settlement; that the trustees and the Trust were "successors" or "assigns" of the Kirwans whose claims were also released in the settlement; that plaintiffs' claims relating to the insurance policy all fell within the definition of Released Claims under the settlement; and that Connecticut General and Ms. Hughes were a CIGNA Affiliate and a CIGNA Associate, and thus, CIGNA Released Persons under the settlement. AA56-98.

In opposing CIGNA's motion, petitioners did not deny that the Kirwans were Financial Planning Class Members who had received the Settlement Notice. *See* AA99-102, AA106-07.

Petitioners likewise did not deny that Connecticut General and Ms. Hughes were CIGNA Released Persons under the settlement. *See* AA99-102. Nor did petitioners dispute that the definition of Released Claims included claims relating to "policies" purchased from or through CIGNA Affiliates and Associates. Instead, petitioners contended, in a conclusory form, that: (1) the Notice and release did not specify "life insurance" policies; (2) petitioners purportedly were "unaware" of their insurance policy-related claims; (3) the Trust and trustees were not sent a separate Notice; (4) petitioners did not receive a settlement distribution, and thus, purportedly received no consideration for the release of their claims; and (5) petitioners' decision to opt out of a settlement in a different, later-filed class action brought against Connecticut General in California somehow prevented them from being bound by the settlement in the Illinois action. AA96-102. In this Court, petitioners seek review of only the first contention raised in the district court and one additional issue raised for the first time on appeal. *See* Pet. i (Question Two).[3/]

6. The District Court's Ruling.

On February 12, 1997, the district court granted the CIGNA Settling Defendants' motion and entered an injunction prohibiting petitioners from continuing to pursue any of the claims in the Texas action. Pet. App. 11-13. The court stated: "The Kirwans are members of the Financial Planning Class

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3/ The question of whether the Notice is defective because it did not specifically name one of the Released Persons, Connecticut General, was not raised until proceedings in the court of appeals. As a result, the court of appeals held petitioners' contention to have been waived and therefore did not address that issue on the merits. Pet. App. 5. We address the merits of that issue in Section IIB below.

which settled here. They did not opt out. Under the terms of the settlement this [failure to opt out] releases their claims and those of successors and assignees." Pet. App. 11. Observing that "[t]he basic facts which underlie Cigna's motion are not disputed" (Pet. App. 12), the district court proceeded to explain why each of petitioners' arguments lacked merit. With respect to the contention that petitioners raise in this Court--that the Notice was inadequate because it did not specify the release of "life" insurance policy claims, the district court held that "[t]here is no weight to the argument that the failure to mention 'life' insurance policies is a flaw in the notice." The court pointed out that "[t]he notice did refer to policies" and rejected petitioners' theory that the phrase "'any policies' does not include life policies." *Id.* The district court further held that petitioners' claims were barred because their claims arose from their financial planning agreement and the resulting advice (Pet. App. 12-13):

> The relationship which is the subject of the Kirwan's Texas lawsuit is the financial planning and estate planning advice they got from Cigna and this, as they tell us in the Texas lawsuit, was the suggestion to buy this policy.

7. Seventh Circuit Proceedings.

On appeal, petitioners submitted an opening brief containing less than four pages of argument (Appellants' 4/25/97 Br. 7-11), and a reply brief containing only six more pages of argument (Appellants' 6/13/97 Br. 1-6). In addition to making the same conclusory contentions that they made in the district court, petitioners raised for the first time the argument that they were entitled to relief because the Notice did

not identify Connecticut General as a Released Person by name, but only as an Affiliate. Appellants' 4/25/97 Br. 8.

After briefing and oral argument, the court of appeals issued an unpublished order affirming the district court. Pet. App. 1-7. In that order, the court rejected the two issues that petitioners raise in their certiorari petition without reaching either one on the merits. With respect to the first issue, that the Notice petitioners received was inadequate because it did not mention Connecticut General by name, the court of appeals declined to consider that contention because it had been raised for the first time on appeal. Pet. App. 5. With respect to the second issue, that the Notice supposedly was wanting because it did not adequately identify the claims being released, the court of appeals similarly rejected that argument because it was too conclusory: "We would consider whether [the district court's conclusion "that the language in the settlement agreement covering 'policies' included 'life insurance policies'"]--although it seems sensible--was an abuse of discretion if the appellants suggested any reason why it was, but they do not." Pet. App. 7.

REASONS FOR DENYING THE WRIT

The petition should be denied because the constitutional questions presented by petitioners have not been shown to have ever been considered by any circuit court on the merits, have not been shown to be of substantial or recurring importance to litigants, and could not affect the result in this case in any event.

1. The questions presented concern abstract issues of constitutional law that do not warrant review by this Court. There is no showing by petitioners that those questions have provoked any disagreement among the lower federal courts.

Indeed, petitioners have not cited any circuit court opinion that has even considered either of the questions presented. The unpublished court of appeals decision in this case is no exception: because petitioners failed to adequately preserve or present the questions presented for appellate review, the court of appeals declined to reach them on the merits.

In light of the absence of decisional law addressing the issues presented, it will come as no surprise that petitioners also have failed to show that the issues are so substantial or of such recurring importance that they demand this Court's attention. Instead, petitioners appear to assert that certiorari review is appropriate to address the adverse effects that the court of appeals' unpublished decision has on their claims in this case. That is fatal to the petition: It is axiomatic that this Court does not issue sweeping constitutional declarations merely to relieve a particular set of litigants of the adverse consequences of a single--and here, unpublished--lower court determination.

2. Even if the questions presented otherwise warranted consideration, certiorari review nonetheless should be denied because this case does not supply an appropriate vehicle for their resolution. Because of petitioners' inadequate presentation of the issues below, the court of appeals refused to reach them. As a result, this Court has neither the benefit of the circuit court's reasoning on the merits of the issues presented, nor a full record from which to evaluate petitioners' contention that they did not have adequate notice that their claims were being released. Before this Court determines the necessity of promulgating new constitutional rules such as those advocated by petitioners, the Court should await a case that frames the problem less abstractly.

In addition, this case warrants no further review because the result here would be the same no matter how the questions presented are resolved. In light of petitioner's failure to abide by the most rudimentary rules of appellate adjudication--particularly those concerning the preservation and presentation of grounds for review--the court of appeals plainly was justified in holding that petitioners waived their arguments. And no conceivable injustice flows from that determination because, on the merits, the Notice at issue fairly apprised petitioners of the release of their claims. The Notice, which petitioners indisputably received, expressly disclosed the release of "any and all" claims relating to "policies" purchased through any CIGNA "Affiliate" or "Associate," as well as all claims relating to financial planning advice provided by CIGNA and its Affiliates and Associates. Petitioners' claims in the Texas lawsuit arose directly from financial planning advice that petitioners received from someone who they knew was a CIGNA broker and Associate, and the resulting purchase of the insurance policy was from a company that petitioners knew was a CIGNA Affiliate. Petitioners therefore were not deprived of any of their rights by the injunction in this case, and for that additional reason, certiorari review would be inappropriate.

I. THE QUESTIONS PRESENTED DO NOT WARRANT THIS COURT'S REVIEW.

Certiorari review should be denied because petitioners have not shown that either of the questions presented for review merits consideration by this Court. To the contrary, the questions are ones that have provoked no disagreement among the lower courts, and indeed, scarce interest among litigants.

A. There Is No Lower Court Conflict On The Questions Presented.

Petitioners have not shown that the unpublished court of appeals decision in this case conflicts with the decision of any other court. *See, e.g., Sanchez v. Borras*, 283 U.S. 798, 798-99 (1931) (dismissing writ as improvidently granted because of lack of circuit conflict); *accord Wisconsin Elec. Co. v. Don Dumore Co.*, 282 U.S. 813, 813 (1931); *Keller v. Adams-Campbell Co.*, 264 U.S. 314, 319-20 (1924); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923). Nor could petitioners point to any such conflict, given that the court of appeals rejected the issues presented in this case without addressing them on the merits, on the ground that petitioners failed to adequately preserve or present them for appellate review.

Not only have petitioners failed to demonstrate a conflict between the unpublished court of appeals decision and some other decision, but they also have failed to point to *any* disagreement among other court decisions on either of the questions presented. Thus, it appears that the petitioners are asking this Court to decide those questions on a clean slate, without the benefit of the reasoning of any prior decision.[4/]

4/ Indeed, petitioners are now raising contentions that they did not present to *either* court below. Specifically, in the course of arguing that the Notice was inadequate because it stated that claims involving "policies" were released, but failed to state specifically that this term included "insurance policies," petitioners further contend that the Notice should have disclosed that claims involving the "churning" of insurance policies were being released. Pet. 10-12. Petitioners never made that argument below--either in the district court or the Seventh Circuit. In any event, as we explain in Section IIB below, petitioners' claims *are* related to the financial planning advice petitioners received--indeed, as the district court held, the claims arise

It would be an understatement to say that the questions presented by petitioners would benefit from further--indeed, any--consideration by the lower courts. *Cf. McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., concurring in denial of certiorari) ("it is a sound exercise of discretion for the Court to allow the various states to serve as laboratories in which the issue receives further study before it is addressed by this Court"). Review of those questions should, at a minimum, await at least *some* consideration in the lower courts before this Court determines the necessity of confronting those issues.

B. The Questions Presented Are Not Of Substantial Or Recurring Importance.

Petitioners have not shown that the questions presented involve issues of substantial or recurring importance. The general constitutional benchmarks governing the adequacy of notices such as that at issue here have long been settled by this Court. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950). Petitioners have failed to establish any pressing need for this Court to reiterate those settled principles, or to supplement them with the new *per se* constitutional rules that petitioners ask this Court to adopt. Indeed, petitioners have pointed to no case even raising the problem this Court is urged to address. Thus, addressing the questions presented "would be of no importance save to the litigants themselves," which is insufficient to warrant Supreme Court review. *See, e.g., Rudolph v. United States*, 370 U.S. 269, 270 (1962); *see also United States v. Johnston*, 268 U.S. 220,

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directly from "the financial planning and estate planning advice they got from Cigna." Pet. App. 12.

227 (1925) (Holmes, J.) ("We do not grant a certiorari to review evidence and discuss specific facts.").

In sum, reduced to its essence, the petition for a writ of certiorari in this case is an appeal for a new set of *per se* constitutional rules that no court has considered, without any showing by petitioners that review of the questions presented is important or necessary. Moreover, petitioners seek to have those rules declared based on a set of factual assumptions that was neither proved nor developed in any way in the courts below. Those factors establish that certiorari review is inappropriate, as Justice Frankfurter's opinion for the Court in *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955), further confirms:

> A federal question raised by a petition may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Petitioners have offered no reason why this case is exempt from those principles, and thus, no reason why certiorari should not be denied.

II. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR SUPREME COURT REVIEW IN ANY EVENT.

Even if certiorari review were otherwise warranted by the importance of the questions presented, which it is not, review should be denied because this case is not an appropriate vehicle for deciding those questions. This case is unsuitable for review because: (1) petitioners waived their contentions by failing to properly raise them in the court below; and (2) on the merits, petitioners had adequate notice of the release of their claims.

A. Petitioners Waived The Questions Presented Below And Thereby Deprived This Court Of The Record Necessary For Proper Consideration Of Those Questions.

This case is not an appropriate vehicle for consideration of the questions presented because those questions were inadequately presented in, and therefore not reached by, the court below. Pet. App. 5. That by itself supplies an appropriate basis for denying review. *See, e.g., Springfield v. Kibbe,* 480 U.S. 257, 259 (1987) (dismissing petition as improvidently granted because issue was not raised below: "We ordinarily will not decide questions not raised or litigated in the lower courts"); *see also Newsom v. Smyth,* 365 U.S. 604, 604-05 (1961); *California v. Taylor,* 353 U.S. 553, 557 n.2 (1957).

Petitioners' waiver is no mere technicality, but a serious impediment to further review because that waiver has deprived this Court of the benefit of any lower court reasoning and of a full record for evaluating the constitutional claims presented by petitioners. By their failure to adequately present their arguments to the court below, petitioners have deprived this Court of the details of what they actually knew and did not

know about the release of their claims. The inadequacy of the record that is the product of petitioners' waiver further demonstrates that this case comes to this Court in a posture that is not suitable for review. *See, e.g., Johnson v. Massachusetts,* 390 U.S. 511, 511-12 (1968) (dismissing petition as improvidently granted because, in light of fact that petitioner did not raise the constitutional issue below, "the record relevant to the constitutional claim now asserted is insufficient to permit decision of those claims"); *Massachusetts v. Painten,* 389 U.S. 560, 561 (1968) (dismissing petition because "the record is not sufficiently clear and specific to permit decision of the important constitutional questions involved in this case"); *Smith v. Mississippi*, 373 U.S. 238, 238 (1963) (dismissing petition because "the record is not sufficient to permit decision of [the] constitutional claims"); *Kimbrough v. United States*, 364 U.S. 661, 661 (1961) (dismissing petition because the question on which certiorari was granted "is not presented with sufficient clarity in this case"); *Oliphant v. Brotherhood of Locomotive Firemen & Enginemen,* 359 U.S. 935, 935 (1959) (denying certiorari "[i]n view of the abstract context in which the questions sought to be raised are presented by this record"); *Rescue Army v. Municipal Court,* 331 U.S. 549, 584-85 (1947) (dismissing appeal because record did not present constitutional question in sufficiently "clean-cut and concrete form").[5/]

5/ As is demonstrated in the section that follows, insofar as the record reveals what petitioners knew or did not know, the record shows that petitioners in fact had adequate notice of the release of their claims.

B. Petitioners Had Adequate Notice Of The Release Of Their Claims.

This case is inappropriate for certiorari review for one more reason: Regardless of how the questions presented are resolved, the result in this case would be the same. As shown above, the court of appeals rejected petitioners' contentions not on the merits, but because they had been waived. Pet. App. 5. That holding would support the decision below however this Court might rule on the questions presented.

On the merits, the Notice that petitioners indisputably received comported with due process, in that it fairly apprised petitioners of the parties and claims to be released. With respect to released parties, the Notice specifically included "CIGNA Affiliates" as Released Persons. Although petitioners attempt to leave the contrary impression, nowhere in their certiorari petition or in any of their briefs below have petitioners ever stated outright that they were unaware that Connecticut General was a CIGNA Affiliate. Petitioners could not make such a claim, given that they purchased their Connecticut General life insurance policy from a CIGNA broker, as a result of financial and estate planning advice that she was providing under the financial services contract that petitioners entered into with CIGNA. Indeed, as the district court in this case found, the recommendation that petitioners buy the life insurance policy arose in the context of the "financial planning and estate planning advice they got from Cigna." Pet. App. 12.

Moreover, a key document, which petitioners confirmed they received at the time they entered into their financial planning contract, *affirmatively establishes* that petitioners have known all along of the affiliation between CIGNA and

Connecticut General. Specifically, in their financial planning services contract with CIGNA (which is annexed to the petition), petitioners, like every other member of the Financial Planning Class, "acknowledge[d] receipt of Advisor's Disclosure Brochure [which] . . . contains important information concerning the background and organization of Advisor and its key people," including "the multiple roles which CIGNA Securities, Inc. and its affiliates play as financial advisor and as issuer, investment manager and/or broker with respect to various financial products." Pet. App. 50. On Page One, in a section called "Who we are," the Disclosure Statement reveals in clear and unmistakable terms the direct affiliation between CIGNA and Connecticut General (AA207; emphasis added):

> CIGNA Securities, Inc. is an investment advisor and securities brokerage firm registered with the Securities and Exchange Commission and appropriate state securities authorities. It is a wholly-owned affiliate of CIGNA Corporation. CIGNA Corporation, with over $50 billion in assets is one of the largest shareholder-owned financial services companies in the world. *CIGNA provides a wide variety of financial and investment services through such subsidiaries as Connecticut General Life Insurance Company and Insurance Company of North America.*[6/]

In light of petitioners' knowledge that Connecticut General was a CIGNA Affiliate, petitioners' complaint about the Notice's failure to reference Connecticut General by name is baseless.

6/ Petitioners did not provide the above quoted Disclosure Statement with their petition, but that Disclosure Statement is attached as an exhibit to the Financial Planning Class complaint and therefore is part of the record in this litigation. *See* AA190, AA206-209.

Petitioners' attempt to derive a due process violation from the way released claims were designated fares no better because the Notice specifically released claims involving "policies." Although it did not address the issue, the court of appeals noted that the district court's holding that this disclosure was adequate "seems sensible." Pet. App. 7.

Petitioners' contrary contention--that claims involving "insurance policies" are not encompassed by a release of claims involving "policies"--strains not only common English usage, but credulity. Petitioners indisputably knew that they were members of the Financial Planning Class and that the claims of that class were being released. As the district court held, petitioners' life insurance claims arose from the financial planning advice that they received from CIGNA. Pet. App. 12-13. Petitioners purchased the life insurance policy at issue from a CIGNA Associate, Ms. Hughes, pursuant to the financial planning contract between CIGNA and petitioners, which specifically provided that recommended "insurance or other financial products" could be purchased from "CIGNA . . . and its affiliates." Pet. App. 49. And as shown above, petitioners knew from the Disclosure Statement that they received in connection with their financial planning contract that Connecticut General was a CIGNA Affiliate.

In sum, the facts stand directly in the way of petitioners' contention that they had no idea that the underlying release relating to the Financial Planning Class would have implications for their life insurance claims. Those claims arose directly from the financial planning advice that petitioners received from CIGNA and pertain to an insurance policy issued by an entity that petitioners knew was a CIGNA Affiliate. The Notice at issue thus was more than adequate to apprise petitioners of the

release of their claims, and for that additional reason, this case is unsuited for Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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